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Federal Communications Commission
Office of the Secretary

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Lifeline and Link Up Reform and Modernization	)	WC Docket No. 11-42
	)	
Lifeline and Link Up	)	WC Docket No. 03-109
	)	
Federal-State Joint Board on Universal Service	)	CC Docket No. 96-45
	)	
Advancing Broadband Availability Through Digital Literacy Training	)	WC Docket No. 12-23

PETITION FOR PARTIAL RECONSIDERATION OF
AMERICAN PUBLIC COMMUNICATIONS COUNCIL, INC.

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SUMMARY

Lifeline support for payphone line service is consistent with Section 254. It will preserve service to millions of Lifeline eligible users otherwise without service even after the Commission's reforms. The Commission should reconsider its bases for not granting relief. Denying Lifeline support means many fewer payphones, if not their total disappearance, along with benefits now realized by low income users.

Contrary to the Commission's statement that without reduced call rates, Lifeline support for payphones doesn't benefit low income users, payphones do provide substantial benefits to low income consumers. They make available to end users free 911, free TRS, and free to the caller 8xx calling; they are available without advance sign up or obtaining equipment and are deployed without any revenue assurance. Trying to pass on Lifeline support by reducing rates on calls wouldn't result in meaningful rate reductions or affect the affordability of payphone service for the low income users of payphones. But Lifeline support is the difference between whether payphones are there for low income users who depend on them for hundreds of millions of calls.

The FCC also misses the point when it says Lifeline is supposed to provide service to low income people in their homes. For the almost half the Lifeline eligible people who won't get home service under the Commission's program, the choice is payphone service or no service at all. Yet the FCC did not even discuss the impact on payphones and their users of its decision.

The FCC relied on a 2002 ruling that payphones don't meet one of several statutory criteria considered in deciding to provide support: that a majority of "residential customers" don't subscribe to the service. However, while all the criteria must be considered, not all must be met, and the FCC itself hasn't applied the residential subscriber criterion to mobile service providers. Payphones fully meet the other specific statutory criteria.

Other non-statutory factors relied upon to deny support in 2002 are no longer relevant. Moreover, in 2002, most payphones were owned by ILECs already receiving significant universal service funds; Lifeline support would have provided more. Large LECs have left the payphone business; small independent PSPs now provide almost all payphones and PSPs are the *only* providers of services to low income consumers that do not get some support.

In this regard, "competitive neutrality" is a bedrock principle of universal service, but the Order leaves in place this decidedly competitively "unneutral" situation and compounds it. The FCC on its own forbore from applying the facilities requirement of the Act to Lifeline-only providers and loosened requirements applicable to them. The FCC did not raise the possibility of similar dispensations to PSPs. The FCC now states that its focus is on broadband and that it doesn't want to use resources on a payphone rulemaking. But the wireless Lifeline programs also relate to delivering voice services, not implementation of broadband.

While Section 276 does not "compel" the FCC to provide universal service support to payphones, the Commission cannot ignore that its current policies are not effectuating the Commission's Section 276 duty to encourage the deployment of payphones and that the Commission could help meet its responsibilities by providing support for payphone services. The statutory mandate compels the Commission to assess the impact of its actions on payphone

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PETITION FOR PARTIAL RECONSIDERATION OF
AMERICAN PUBLIC COMMUNICATIONS COUNCIL, INC.

The American Public Communications Council, Inc., ("APCC") hereby petitions for reconsideration of that portion of the Commission's Report and Order, ("*Lifeline Order*")[1] in the above referenced matter that denied the Petition for Rulemaking, filed by APCC, that sought Lifeline support for payphone line service ("*Payphone Line Support Rulemaking Petition*")[2] and that portion of the Commission's Report and Order in the above referenced matter that denied the request for interim relief ("*Emergency Interim Relief Petition*"),[3] also filed by APCC, that sought Lifeline support for payphone line service pending action on the *Payphone Line Support*

[1] *Lifeline and Link Up Reform and Modernization,* WC Docket No. 11-42, *Lifeline and Link Up,* WC Docket No. 03-109, *Federal-State Joint Board on Universal Service,* WC Docket No. 96-45, *Advancing Broadband Availability Through Digital Literacy Training,* WC Docket No. 12-23, FCC 12-11 (Adopted January 31, 2012, Released February 6, 2012). The portion of the Report and Order for which APCC seeks reconsideration is contained in the slip opinion at 166-67, Section XII, ¶¶ 392-398.

[2] *Petition for Rulemaking to Provide Lifeline Support to Payphone Line Service* filed December 6, 2010.

[3] *Emergency Petition for Interim Relief to Prevent the Disappearance of Payphones,* filed December 6, 2010.

Rulemaking Petition. (The *Payphone Line Support Rulemaking Petition* and the *Emergency Interim Relief Petition* are together referred to as the "*APCC Petitions*.")

I. SUMMARY OF PROCEDURAL HISTORY AND APCC SUBMISSIONS

The *Payphone Line Support Rulemaking Petition* and the *Interim Relief Petition* were filed on December 6, 2010. The *Payphone Line Support Rulemaking Petition* explained that payphones are the ultimate form of universal service —an always on, on demand reliable high-quality dial-tone service, available twenty-four hours a day, seven days a week, 365 days a year with no advance sign up. It described in detail why, even with the Commission's program for providing Lifeline support for mobile wireless service, payphones are still a vital safety net for many users and will remain the only service available for many users. As the *Payphone Line Support Rulemaking Petition* detailed, and as the Commission itself has since acknowledged, funding and outreach limitations will mean all qualifying low-income consumers will not be provided with Lifeline mobile wireless phones.[4] For those left without a mobile wireless phone, there is no service. Payphones remain their only means of access to the network –broadband or traditional public switched telephone network.[5] But payphone deployment is on a precipitous downward trajectory and payphones are in danger of disappearing.[6]

A Public Notice [7] requesting comments and reply comments on the *APCC Petitions* was issued and comments and reply comments were duly filed. In its reply comments,[8] APCC

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[4] *Lifeline Order* at ¶¶ 357-358, and accompanying footnotes. *See also* Note 25, *infra,* and accompanying text.

[5] *See, e.g. Payphone Line Support Rulemaking Petition* at11-17.

[6] *See, e.g., Payphone Line Support Rulemaking Petition* at 8-11, *Emergency Interim Relief Petition* at 1-2, 5-6.

[7] *Wireline Competition Bureau Seeks Comment on American Public Communications Council Petitions Regarding Universal Service and Payphone Issues,* CC Dkt. No. 96-45; WC Dkt. No. 03-109, Public Notice (DA 10-2630, Issued December 16, 2010).

reiterated many of the points already made in the *APCC Petitions*. APCC addressed arguments regarding the Commission's authority, including arguments regarding the Commission's authority to adopt Lifeline support for payphones.[9] It is unquestionable that payphones now overwhelmingly serve low income consumers.[10] APCC made clear that while APCC is not seeking curtailment or limitations in the support the Commission was providing to other services, including mobile wireless services, the Commission must consider that payphones could be a more efficient means of providing service to low income consumers than providing services to individuals.[11] Moreover, the Commission had to consider the impact on the payphone industry, particularly the competitive impact and the impact on payphone deployment, of the Commission's Lifeline support of other services, particularly mobile wireless services.[12]

Subsequently, the Commission issued the Notice of Proposed Rulemaking in *Lifeline and Link Up Reform and Modernization*.[13] APCC again stated that while APCC was not seeking to curtail or limit support for other services,[14] "the Commission must consider the merit of and

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[8] Reply Comments of the American Public Communications Council (filed February 2, 2011) (hereafter "*APCC PN Reply Comments*").

[9] *Id.* 2-4. Indeed APCC specifically addressed the same points cited by the Commission in denying the *APCC Petitions,* referring to the discussion in the *Payphone Line Support Rulemaking Petition.*

[10] *Id. 7-8.*

[11] *Id.* 6-7, again referring to fuller discussions contained in the *APCC Petitions*.

[12] *Id.* 4-5, 22-23; *APCC PN Reply Comments,* at 8-9..

[13] *Lifeline and Link Up Reform and Modernization*, FCC Dkt. No. 11-42, et. al, Notice of Proposed Rulemaking, FCC 11-32 (Released March 4, 2011).

[14] While parts of this Reconsideration Petition discuss the adverse impact on payphone deployment and the Commission's failure to address the adverse impact on payphones of the differences between the Commission's actions with regard to wireless mobile services and payphone services, APCC is not seeking any change in the Commission's actions with regard to support for wireless services. Rather APCC's objective is to obtain fair and nondiscriminatory treatment for payphone line service so as to ensure that low income consumers who must rely on payphones also have some services available to them.

weigh the efficiencies and other benefits of Lifeline support for payphone lines as compared to Lifeline support for mobile wireless and other forms of service." APCC requested that the Commission act on the *Emergency Petition* in the event it had not acted on the *Payphone Line Support Rulemaking Petition* by the time it acted in *Lifeline and Link Up Reform and Modernization*.[15] In its reply comments, APCC pointed out again that USF support for payphone line service should be a component of Lifeline and that support for payphone line service is consistent with and furthers the Commission's efforts for Lifeline reform, and APCC again requested that the Commission grant the *Interim Relief Petition* as part of its action in the instant proceeding.[16]

The Commission denied the *APCC Petitions*. The rationale advanced by the Commission's decision is discussed below as we discuss the grounds for reconsideration.

II. ARGUMENT

A. Lifeline Support for Payphone Line Service Is Consistent With Section 254

In the Lifeline *Order,* the Commission "question[ed] whether" support for payphone line service "is consistent with Section 254."[17] Significantly, while advancing several considerations, the Commission did not make a determination that the relief requested is inconsistent with Section 254.

1. Pass through of Lifeline Support

[15] Comments of the American Public Communications Council, Inc., at 5 (filed April 21, 2011 (hereafter "*APCC 11-42 Comments*"). At the time the Commission issued its Public Notice requesting comments and reply comments on the *APCC Petitions, see* note 7, *supra*, the Commission had not yet initiated *Lifeline and Link Up Reform and Modernization* and the *APCC Petitions* were assigned to WC Docket No. 03-109 and WC Docket No. 96-45.

[16] Reply Comments of the American Public Communications Council, Inc. (filed May 10, 2011) (hereafter "*APCC 11-42 Reply Comments*").

[17] *Lifeline Order* at ¶395.

One basis for questioning whether support for payphone line service is consistent with Section 254 was the Commission's concern that under the proposal as advanced by APCC there would be no obligation for the PSP to pass through to consumers in the form of reduced rates for calling the amount of the Lifeline support. From this, the Commission reasons that there is no benefit to low income consumers, and the Lifeline support provided for payphone line service is a "windfall to payphone service providers" ("PSP"s).

Before turning to a specific response to this point, three observations are in order. First, there is no payment to PSPs under the relief APCC and PSPs seek. As in all other universal service programs, payment would be to the serving ETC. The PSP would see a reduction in the charges imposed by the serving ETC. Second, there is virtually no question but that at this point in time, the services provided by payphones are provided overwhelmingly if not exclusively to low income users.[18] Thus Lifeline support for payphones would be reaching the class of users

[18] As APCC explained in the *APCC PN Reply Comments,* at 7-8 (footnote omitted), some comments in that proceeding

> raise the bogeymen of a payphone in expensive malls and payphones in "prestigious social clubs." By definition and by the logic of the comments that raise these very arguments, upper and middle class shoppers and clients who frequent these premises *will not* be the ones using the payphones there, if there is a payphone there. Those shoppers and clients will be using their mobile phones. The users of the payphones will be the patrons who otherwise are without mobile service—either for temporary reasons (like battery failure) or because they cannot afford service—and the low income workers who provide the services to those shoppers and who are the low income people at whom universal service is directed. It is the line cook at the "prestigious social club" being paid minimum wage who will use the payphone on her break to check in with her husband or the domestic worker who is stuck at the bus stop in Bethesda, MD who will be using those phones to get word to the child care center. Similarly, it is the relatively low income traveler at the airport who can't afford mobile service who will be using those payphones but who will have no means of communicating when those phone booths are replaced with charging stations {for mobile phones], as even casual observation makes clear is happening.

for whom Lifeline support is targeted.[19] Third, the number of payphones in service has been on a dramatic downward trajectory. This trend is discussed in greater detail in the *APCC Petitions*.[20] For present purposes it is sufficient to note that since 1997, the year after the 1996 Act, the number of payphones has gone from an estimated 2.2 million to less than 475,000 at the time the *APCC Petitions* were filed in December, 2010. Since then, APCC estimates that the number of payphones in service has fallen to about 400,000 units.

Turning to the Commission's analysis, it ignores entirely the contribution payphones already make to universal service and the benefits low income consumers receive from payphone deployment. Payphones are the epitome of universal service. Payphones are deployed and made available at no cost. Payphone service is "always on." It is an on demand reliable high-quality dial-tone service, available twenty-four hours a day, seven days a week, 365/6 days a year. *Unlike every other form of communication available to the public,* users are not required to make an initial investment in equipment, await activation of the service or pay recurring monthly charges. Users can call anywhere at any time. Users have the option of paying for calls with coins or by use of calling cards, prepaid cards or other access code arrangements. Users can also place calls to 800/toll free subscribers at no charge to the caller.[21] And of course, full 911 service and TRS calling are also available free of charge twenty-four hours a day, seven days a

[19] The one possible exception is that in times of national emergencies, crises, or disaster, payphones have proven to be more robust than mobile wireless lines. For example, there are repeated instances of payphones being the only means of communication after 9/11, during power failures, in much of the area affected by hurricane Katrina, etc. While not immediately relevant to universal service, the fact that payphones can be the only line of communication in times of emergencies should be of interest to the Commission.

[20] *See, e.g., Payphone Line Support Rulemaking Petition* at 8-11, *Emergency Interim Relief Petition* at 1-2, 5-6.

[21] There is more than anecdotal evidence that this service in itself is an enormous advantage for low income users who make extensive use of payphones to call the toll free numbers often available to reach social service agencies, such as food stamp agencies, employment agencies, drug hot lines, etc. The long hold times that are sometimes associated with these services make it impractical to use Lifeline supported wireless phones for these calls since doing so will rapidly diminish the allotment of minutes.

week across the nation's public payphone base. No other service provider except PSPs, and certainly not providers of wireless mobile, makes available or deploys such a service –much less for free—with no assurance of any recovery and at no cost to any end user. It is those who are without service at all –low income consumers—who are most in need of the availability of these services.

Thus the Commission is wrong when it says there are no benefits passed through to low income consumers. There will be fewer payphones, if they do not disappear altogether in the absence of relief, and these benefits to low income consumers will be lost. The Commission's primary policy concern –that "Lifeline is intended to benefit eligible low-income consumers, not service providers"[22]—is vindicated. Yet the Commission did not analyze at all what the reduction in the availability of payphones –if not their total disappearance– that will occur as a result of the Commission's decision-will mean for low income consumers.

Moreover the Commission's analysis misses the critical role Lifeline support for payphones is designed to serve. Lifeline support for payphones is designed to preserve the availability of payphone service which, as discussed above, is in many cases the only service that is available for low income users. Payphones are in danger of, and indeed are, disappearing entirely, as discussed above. As explained at length in the *Payphone Line Support Rulemaking Petition*, payphone service is a marginally profitable business. In the absence of Lifeline support, payphones will disappear. The issue here is not service at a reduced rate to low income

[22] *Lifeline Order* at ¶396. We note also that Lifeline support often benefits service providers as well as the ostensible targets of the benefits, low income consumers. For example, the mobile wireless carriers to whom the Commission has granted waivers and for whom the Commission forbore from applying the full requirements of the Act have used the Lifeline support as a means of entry to a new market that is highly profitable for them and receive substantial additional revenue aside from the basic Lifeline service revenue they receive from the Commission. The fact that service providers may also realize some collateral benefit from universal service support has not inhibited the Commission from providing such support so long as the primary purpose of universal support –providing service to low income consumers who otherwise would not have access to service—is achieved. *See text following this note.*

people who rely on payphones; the issue is whether low income people will have any service at all available. The Lifeline support is the difference between a payphone being able to remain in service and its being removed from service.

On the other hand, trying to pass on the reductions to consumers is not likely to lead to any change in the affordability of payphone service for low income consumers. The 400,000 payphones in service are believed to process somewhere between 750 million and a billion calls on an annual basis, or, using the lower end of the estimate of the number of calls, on average somewhere around 150 calls per month each. If the Commission's proposed support rate of $9.25 a month were spread across the calling base, it would mean a reduction in the price of a call from the current prevailing rate of $.50 to about $.45. If the calls are spread among 35 users or so of the payphone, that is a reduction in the cost of the service to each user from $2.00/month to on average about $1.80/month, a savings of $.20, or twenty cents, a month per user. While of course every cent is valuable to low income consumers, the twenty cent savings –even if doubled– is not likely to be an amount for even low income users that will affect the affordability of the service.[23] Thus while, on the one hand, Lifeline support that is not passed on can be the difference between a payphone's being sufficiently economically viable so it remains in place and is there to use and, on the other hand, there being no service at all, passing on the support does not affect in any meaningful way the affordability of the service but can mean the disappearance of the service.[24]

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[23] Of course, if the higher end of the estimate of the number of calls were used, or if the number of users of the payphone goes up, the savings per consumer goes down, and there is even less impact on the affordability of the service.

[24] Moreover, attempting to pass on the savings is not likely to work in many instances. At the moment, users typically deposit two quarters to make a call. Payphones do not have the ability to return change. While some consumers may have the correct change for a $.45 call, and/or be willing to carry and use three coins instead of two to make a phone call, and/or may be willing to –and have available to them at the time of the call someplace to-- get

The choice the Commission must make here is between some affordable service for those low income consumers who for whatever reason –the failure of outreach programs to reach them, budget constraints on the program, etc.—do not end up participating in the mobile wireless phone program and the disappearance of the last vestige of access to the network for these low income users.

2. Affordable Service Versus No Service

With regard to the last point in the previous paragraph, the choice between some service for these low income users and no service at all, there are several related points

The Commission also was concerned that Lifeline support for payphones was "inconsistent with [its] longstanding commitment to ensure that low income consumers have access to phone service in their homes." There is no question but that providing service to all low income users in their home is a worthy objective. But that ideal is, at least at the moment, not within reach. If the choice were between providing low income consumers with service in their homes and payphone service, the Commission might well decide to provide service in the home. But this posits a false choice. Given that the Commission is not now and will not in the future be in a position to give all low income consumers service in their homes and that roughly half those people eligible for Lifeline support will not have service in their homes ,[25] the choice is rather between payphone service and no service. *It is consistent* with the Commission's

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the correct change, many will not. Thus many consumers will not realize the savings even if PSPs could attempt to pass it on without threatening the economic viability of the service.

[25] After taking account of the reforms adopted by the Commission, including increased outreach, changes in eligibility guidelines, and reforms to eliminate duplication, ineligibles, and other abuses, the take rate for Lifeline support at the end of the next three years will be at 51%. *Lifeline Order*, at ¶¶ 357 et. seq. and accompanying footnotes. Thus about half the eligible Lifeline recipients will still be without service.

universal service goals to strive to make at least some service available to low income consumers –even if it cannot be a personal mobile wireless phone or a phone in their home.

In a related vein, as APCC pointed out, in a variety of circumstances, payphones are a potentially far more efficient and economical vehicle for providing some service to a large number of low income consumers than is the Commission's current program supporting mobile wireless service. If only a small volume of traffic, just a few calls, is diverted from a marginal payphone because one or two users of that payphone obtain Lifeline supported mobile handsets and no longer use the payphone, and the result is that the payphone is removed, while the recipients of the Lifeline supported mobile sets may have an improvement in the level of service they receive, dozens of users of that payphone are now totally without any service.[26] Clearly a single Lifeline support payment for the payphone line service would be far more economical than attempting to provide the dozens of people who formerly used the payphone with mobile phones or service in their homes.

Payphones play an important back-up and complementary role even for those who have Lifeline-supported mobile phones. Lifeline supported mobile phones generally come with a predetermined number of minutes beyond which per minute charges apply, often at high rates. Payphones that generally provide unlimited local calling for a fixed rate and extremely

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[26] *See, e.g., Payphone Line Support Rulemaking Petition* at 20-22. If a typical payphone at the margin generates sufficient revenue to be viable with 120 calls a month and serves 35 callers making 3 calls/month, and 15 callers making one call/month, and 3 of the callers accounting for 7 calls/month obtain Lifeline supported mobile phones, the payphone is no longer economically viable and will be removed, leaving the remaining 47 payphone customers with no service. The numbers used here are for illustrative purposes. *See* Note 23, *supra,* and accompanying discussion in text.

competitive toll rates can be a much more economical calling option for many calls, either to conserve minutes or to make calls once the minute limitations are reached.[27]

Moreover, just as the Commission has recognized the importance, significant benefits, and economic efficiencies of making broadband internet access available to large segments of the population through publicly available "anchor" facilities as an important supplement and back up for home subscriptions, so too for payphones. Indeed as part of the broadband stimulus program, the federal government is funding creation of public computing centers. Payphones are an equally important part of a plan to make Lifeline available to low income users

3. Residential Customers

Another consideration advanced by the Commission was that the Commission "must define services eligible for universal service based in part on a determination that the services have 'through the operation of market choices by customers, been subscribed to by a substantial majority of residential customers . . . .'" and payphones do not meet this criterion. The Commission observed that the Joint Board had, in 2002, rejected a similar proposal for Lifeline support for payphone line service, "in part" on the basis that payphones do not meet this criterion. The Commission, relying on the same factors set forth by the Joint Board, had agreed with the Joint Board.[28]

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[27] Also, as discussed above toll free calling is free to the caller at payphones. Many calls to toll free numbers by low income users are to service agencies providing support services and can have long hold times. Payphones are an important complement to mobile service; the payphones provide a much less expensive way to make calls that otherwise would exhaust the minutes or cause the user to incur extra charges on a Lifeline supported mobile phone. *See* Note 21, *supra*, and accompanying text.

There are several points to be noted here. As stated in the *Payphone Line Support Rulemaking Petition*,[29] there is no requirement that all of the enumerated four criteria listed in Section 254(c)(1) must be met. Rather, the Commission "shall consider the extent to which" each is met. The Commission is free to find that a service meeting all the other criteria should be supported despite its failure to meet one of the criteria, so long as the Commission has "considered" all of the criteria in its determination.[30] Neither any party nor the Commission has questioned whether payphone line service meets the other criteria contained in Section 254(c)(1). Indeed, in its earlier decision the Joint Board found that payphone line service did meet the other specific criteria enumerated in Section 254.[31] The Commission made no finding that payphones were legally required to meet the residential customer requirement. But the Commission did not engage in the process of weighing the Section 254(c)(1) criteria; it simply disqualified payphone line service based on its failure to meet the "residential customer" requirement.

Moreover, although the Commission has found that mobile services are eligible for Lifeline support, there been no finding that mobile services "have 'through the operation of market choices by customers, been subscribed to by a substantial majority of residential customers.'" While the ubiquity of mobile service users is evident, it is not at all clear wireless mobile services are subscribed to by a majority of "residential customers." The Commission

[29] *Payphone Line Support Rulemaking Petition* at 23-24. *See also, id. at 31-32*, explaining why payphone line service does meet the Section 254 criteria.

[30] *APCC PN Reply Comments* at 3-4,

[31] *Federal –State Joint Board on Universal Service, See* 17 FCC Rcd 14095, 14114 (2002). Based on a weighing of other factors and additional considerations advanced by the Joint Board, the Board concluded that universal service support was not warranted *at the time* under the general public interest criterion of Section 254(c)(1)(d). As we discuss in the text below, the *Payphone Line Support Rulemaking Petition* addressed why the factors relied upon by the Joint Board are no longer relevant but the Commission analyzed neither those other factors nor APCC's arguments about why they were no longer applicable.

stated that 30% of adults live in households with mobile wireless service only.[32] CTIA reports that as of June, 2011, 31% of households were wireless only.[33] Any mobile subscriber who retains a residential land line has not subscribed to mobile service as a "residential customer." Thus, that leaves 69% of households as "residential customers" of wireline carriers or other providers.[34] After some research, APCC was unable to locate data that would support the conclusion that mobile services meet this statutory criterion. Thus, the Commission has already at least implicitly recognized that satisfying all the enumerated criteria –and particularly the residential customer requirement-- in Section 254(c)(1) is not required. Yet the Commission considered none of the other statutory criteria in rejecting the *APCC Petitions.*

Nor did the Commission examine the other factors relied upon by both the Commission and the Joint Board in reaching their conclusions in 2002 not to provide support for payphone line service, Both the Commission and the Joint Board relied on a number of considerations not directly covered by the statutory criteria. As the Commission stated, the Joint Board's 2002 determination and the Commission's affirmance of the Joint Board relied only "in part" on the failure to meet the "residential customer" criteria.

The environment has changed radically since 2002. One example is that at the time of 2002 ruling, the majority of payphones were provided by ILECs, who were already recipients of substantial amounts of universal service funds, and Lifeline support would have provided

[32] *Lifeline Order* at ¶21.

[33] U.S. Wireless Quick Facts, http://www.ctia.org/advocacy/research/index.cfm/aid/10323 (last viewed March 12.2012).

[34] Moreover, while precise data is not available, many subscribers to mobile services, undoubtedly including some of the subscribers in some wireless only households, subscribe as part of a company or other kind of affinity group subscriber, or use mobile service provided by their employer or business. Thus some of those wireless only households have not made a "market choice" to subscribe to wireless services as a "residential customer", further eroding the possibility that wireless mobile service meets the standard to which the Commission held payphone service.

additional support to them. Today, all of the large LECs have left the payphone business and it is small independent providers who are not currently recipients of any universal service funds who provide virtually all payphones. In the *Payphone Line Support Rulemaking Petition* [35] and the various comments filed by APCC,[36] each of the other factors relied upon by the Commission and the Joint Board in the earlier determination was discussed and analyzed, and it was explained why, because of changed facts or other developments, each of the factors was irrelevant or otherwise not applicable in the context of the current requests.[37] In denying the *APCC Petitions,* the Commission discussed none of these changed circumstances and the need to adjust its analysis to address them.[38]

B. Lifeline Support for Payphones Is Consistent With The Commission's Policy Directions.

The Commission stated that it did not believe that it should devote resources to exploring whether Lifeline support should be provided to payphones when its current focus is on reforming the program to protect it against waste, fraud and abuse and focus the program to include broadband.[39] But granting the relief sought in the *APCC Petitions* is consistent with the

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[35] *Payphone Line Support Rulemaking Petition* at 23-27.

[36] *See, e.g., APCC PN Reply Comments* at 2-3.

[37] For example, both the Joint Board and the Commission expressed concern that the number of ETCs eligible for USF support would decline because ETCs, which at the time were mostly CLECs and perhaps a handful of CMRS carriers, might not offer payphone service. But as APCC pointed out, it is a simple task for ETCs to meet this requirement. In fact CMRS carriers largely already meet it, particularly in the current "call anywhere minutes" environment. Moreover, given the Commission requirements for payphone lines, to the extent waivers to provide the service are not readily available (as they are under Commission rulings), CLECs can also easily comply. *Payphone Line Support Rulemaking Petition* at 24-26. In any event with the decline in the number of CLECs and the increase in the number of CMRS carriers offering Lifeline service, the concern expressed by the Joint Board and the Commission is no longer relevant. Yet in denying the *APCC Petitions,* the Commission did not even discuss its reliance on these factors in its earlier ruling; it simply relied on the earlier ruling.

[38] *Compare, e.g., Lifeline Order* at ¶49, where the Commission recognized the need to conduct its analysis and develop its rules in light of changed circumstances and changing market conditions.

[39] *Lifeline Order* at ¶395.

Commission's continuing emphasis on the importance of voice services and is an efficient use of Lifeline resources with no real potential for abusive practices.

Although the Commission has embarked on a path to make broadband ubiquitously available and to refocus the universal service program on support for broadband,[40] the Commission continues to require ETCs to provide voice service in addition to broadband services.[41] The Commission recognized that voice service is the basis for the Commission's authority to embark on the broadband path.[42] The importance of voice services is a dominant theme through all the Commission's reforms. At the same time that the Commission observed that all consumers benefit from widespread subscribership to voice and broadband services, the Commission specifically went on to observe that "Moreover, voice services remain a prerequisite for full participation in our economy and society."[43] Indeed while being mindful of voice service being offered as an application over broadband service, the Commission nonetheless adopted separate goals for voice and broadband services, and the very first goal adopted is to "Ensure the Availability of Voice Services To All Low Income Americans."[44]

But the Commission exhibited a strangely dichotomous attitude in implementing its commitment to make voice services available to all Americans. At the same time as the Commission stated that its focus was on using Lifeline to support broadband, the Commission, *on its own motion*, granted a blanket forbearance from application of the facilities requirement of

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[40] *See generally, Connect America Fund,* __ FCC Rcd __, FCC 11-161 (Released November 18,2011).

[41] *Id.,* ___ FCC Rcd ___, FCC 11-161 ¶¶ 76-85.

[42] *Id.* ___ FCC Rcd ___, FCC 11-161, ¶¶ 61-65.

[43] *Lifeline Order* at ¶ 17. *See also, id.* at ¶ 3(Commission savings will still allow "service to consumers who remain disconnected from the voice networks . . . ").

[44] *Id.* at ¶¶ 26-27.

Section 214(e)(1)(a) in order to facilitate entry by more Lifeline-only mobile wireless providers to provide voice service.[45] The Commission also eliminated requirements that most Lifeline-only providers who provide voice only services would not satisfy.[46] The wireless services which are currently provided to qualified consumers provide minutes of voice use, not broadband access.[47] These Lifeline-only providers have little to do with the Commission's implementation of its broadband plan. Their relevance here is as voice Lifeline providers to low income consumers. Thus the Commission has not only already devoted a significant effort to addressing the voice needs of low income consumers with virtually no impact on its efforts to apply Lifeline to broadband, but it has pledged significant resources to these efforts with Lifeline-only wireless voice providers into the future.

On the other hand, at the same time as the Commission embarked on a program that will expand its existing programs of providing Lifeline service with wireless voice services, the Commission was unwilling because of the Commission's broadband focus to devote any resources to examining payphone line service support.[48] The Commission did not discuss and expressed no concern with how the removal of payphones would affect the availability of voice service to low income consumers. It certainly did not consider any steps to make additional payphones available to provide additional services, as it had done in the case of voice wireless

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[45] *Lifeline Oder* at ¶368.

[46] *See, e.g.,Lifeline Order* at ¶ 386, eliminating the requirement under Section 54.202 of the Commission's rules that Lifeline-only applicants submit a network improvement plan. The Commission recognized that the g majority of Lifeline-only ETCs are not facilities based at all. *Lifeline Order* at n. 1208.

[47] Whatever broadband capability may be available on the network of the ETC is not available to Lifeline consumers as part of the Lifeline service. The Commission did in the *Lifeline Order* allow Lifeline support to be applied to services that offer broadband capability but the broadband capability is not part of the Lifeline service.

[48] This aspect of the disparate and discriminatory treatment of payphone service and wireless service must also be considered in light of the discussion in the text below (*see Section* D(1)) of the Commission's failure to treat payphone line service in a competitively neutral manner.

services. It looked for no work-arounds to or dispensations from impediments to expanded voice services using payphones as it has done with wireless mobile. The Commission did not explain why the extraordinary efforts were warranted for wireless but no resources were worth expending to even examine the role of payphones in providing voice services to low income consumers. Given the Commission's continuing emphasis on voice services, the Commission surely needs to examine the role of payphones in delivering that service to low income consumers who otherwise will not have access to any service.

Moreover, while many of the reforms adopted by the Commission may help eliminate waste, fraud and abuse generally, no small number of the issues the Commission had to address are unique to or are exacerbated by the challenges of bringing the benefits of Lifeline supported wireless services to low income consumers.[49] By contrast, as explained in the *Payphone Line Support Rulemaking Petition*, there are virtually no such problems associated with payphone line support.[50] The Lifeline support the payphone line service would receive is less than the PSP's monthly dial tone cost paid to the ETC. In addition, there are costs of maintaining and servicing a phone in place. Thus unlike in the case of wireless mobile service, there is no incentive either

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[49] For example, the issue of minimum charges for what is otherwise a service free to end users is unique to wireless services. In a related vein, non-usage is a problem heightened by the presence of mobile wireless services.

[50] *See Payphone Line Support Rulemaking Petition* at n.62 and accompanying text.

We note that the Commission noted its concern that the support requested by APCC would apply to all payphones, including those that might not otherwise meet the definition of a "public interest phone" as discussed in the legislative history of Section 276. *Lifeline Order* at n.1026. As a general matter, the issue of whether the limitations on public interest phones should be applicable to any program of support for payphone line service is precisely the kind of issue it is appropriate to address in a rulemaking proceeding, not the kind of issue warranting summary disposition without any exploration. The issue of limiting principles for rules is generally thrashed out in a rulemaking, not as part of the agency action rejecting a rulemaking proceeding, and APCC will welcome that discussion.

More specifically, we note that in the marketplace, the phenomenon of payphones side by side, or banks of payphones, is overwhelmingly a phenomenon of the past. There are extremely few areas where there is enough traffic to warrant more than a single payphone. Largely for historical reasons or reasons having to do with the relation with the premises owner, there remain a relatively few locations where there is more than one payphone in proximity to another.

to place payphones or maintain them in place just for the purpose of getting Lifeline support. Thus payphone line support will not divert the Commission's efforts to eliminate any abusive practices.

C. Lifeline Support for Payphone Line Service Is An Efficient Way to Provide Support For Low Income Consumers and a Wise Expenditure of Universal Service Funds

As explained in the *Payphone Line Support Rulemaking Petition* [51] and mentioned above,[52] there are a variety of situations where it will be more efficient to provide service to low income consumers with payphones than with mobile wireless service, as when a marginal payphone is taken out of service because of the decreased usage resulting when a handful of users of that payphone receive Lifeline supported wireless services –leaving all the former users of the payphone with no service at all. Moreover, as explained above, the Commission anticipates that even with its enhanced outreach programs adopted in the *Lifeline Order,* barely more than half the qualified households will be reached by Lifeline supported services,[53] leaving about half the qualified users with no service at all except the services provided by payphones.

The annual cost of providing all the remaining payphones, 400,000, with the Commission's proposed Lifeline support of $9.25/month is $48,000,000. The Commission expects to spend $2,100,000,000.00 on Lifeline support in 2014, and more in the intervening years while at the same time saving funds from the levels projected under current practices.[54] The additional expenditure of $48,000,000 to make available some service to the 49% of the

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[51] *E.g., Payphone Line Support Rulemaking Petition* at 20-22

[52] *See* Section A (2), *supra.*

[53] *See* Section A (2) and note 25, *supra.*

[54] *Lifeline Order* at ¶ 357 and accompanying footnotes. Similarly, the Commission expects to save over $2, 000,000,000 in the three year period. *Id.*

qualified households who will otherwise have no service at all available to them and receive no benefit from the Commission's universal support program is more than warranted.[55]

D. The Commission's Implementation of Section 254 With Regard to Payphones Failed to Address the Statutory Requirements, Particularly When Considered With Other Statutory Mandates. These Concerns Dictate Support for Payphone Line Service

1. The Commission's Uneven Implementation of Section 254

The *Payphone Line Support Rulemaking Petition* and related pleadings [56] raised both the issue of the lack of competitive neutrality and the issue of the lack of technological neutrality in the Commission's implementation of Section 254.[57] APCC explained that competitive and technological neutrality required the Commission to match its support of mobile wireless phones with support for payphones. The *Payphone Line Support Rulemaking Petition* explicitly explained the disparate, anticompetitive impact the Commission's treatment of, on the one hand, support for mobile wireless services and, on the other hand, the lack of support for payphones, was having on payphones –leading directly to the removal of payphones as the Commission expanded its universal service support for mobile wireless services.[58]

[55] The $48,000,000 figure assumes that all payphones would receive support. Obviously, if some payphones are excluded from support by changes to the proposed rule, the amount of support would be lower. *See* note 50, *supra*

[56] *E.g., Payphone Line Support Rulemaking Petition* at 22-23, *APCC PN Reply Comments* at 8-9.

[57] These issues were raised separately from the issue of the ability of payphones in certain circumstance to be a relatively more efficient way to provide service to low income consumers. See discussion above in Section (A)(2).

[58] *Payphone Line Support Rulemaking Petition* at 19-23.

The Commission acknowledged that it was aware of these arguments.[59] Yet the Commission did not address the disparate and anticompetitive impacts resulting from its uneven administration of Section 254.

Competitive neutrality is a bedrock principle of Section 254. From the very *First R& O* implementing Section 254,[60] the Commission has declared competitive neutrality as a core principle of universal service [61]and stressed the importance of competitive neutrality. The *First R&O* is replete with instances where the Commission recognized its responsibility to implement Section 254 in a competitively neutral manner.[62] Moreover, the Commission found that "technological neutrality" is part and parcel of competitive neutrality. The Commission stated that "the principle of competitive neutrality in this context should include technological neutrality."[63]

Indeed the Commission relied upon the principle of competitive neutrality to impose universal service contribution requirements on PSPs. The Commission stated "[t]hat because payphone aggregators are connected to the PSTN and because they directly compete with mandatory contributors to universal service [referring to the ILECs, who at the time were all

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[59] *Lifeline Order* at ¶393.

[60] *Federal-State Joint Board on Universal Service*, 12 FCC Rcd 8776, FCC 97-157 (1997) (hereafter "*First R&O")*

[61] 12 FCC Rcd 8801-8802, ¶¶ 46-48 ("we establish 'competitive neutrality' as [a] . . . principle upon which we base policies for the preservation and advancement of universal service").

[62] *E.g.*, 12 FCC Rcd 8968-71, ¶¶ 364-68(setting the subscriber line charge as the pass through to subscribers by CLECs and other competitive carriers in order to make them eligible for Lifeline);12 FCC Rcd 8874-76, ¶¶ 170-172(declaring the location of facilities used to provide service to an area to be irrelevant for purposes of the ETC's eligibility for Lifeline support);12 FCC Rcd 8867-68, ¶¶ 164-166 (treating unbundled network elements as facilities in order to make resellers of unbundled network elements eligible for Lifeline).

[63] 12 FCC Rcd 8802, ¶ 49 (citations omitted).

competing in the payphone arena] the public interest requires payphone providers to contribute to the support mechanisms."[64]

The Commission has ruled that the principle of competitive neutrality, including technological neutrality, applies not just to the contribution side, but as well to the support and eligibility side of universal service as well. In adopting the principle of competitive neutrality, the Commission stated that it agreed

> with the Joint Board that that an explicit recognition of competitive neutrality in the collection and distribution of funds and *determination of eligibility in universal support mechanisms* is consistent with congressional intent and necessary . . .[65]

At the moment, payphone lines are the only service directly serving low income consumers not receiving some form of Lifeline support. Every other service provider who provides a service for low income consumers –mobile wireless and landline—receives Lifeline support for the line providing the service. In analogous contexts, the Commission has recognized that it contravenes principles of competitive neutrality for there to be one form of providing service that does not have access to universal service support while others do.[66]

Under the Commission's current universal service rules, support is provided to a direct competitor of the PSPs who uses a different technology. Yet the Commission has not addressed the issue of competitive neutrality as it affects payphones in any of its decisions granting forbearance or waivers to wireless providers to provide Lifeline services. Indeed Lifeline

[64] 12 FCC Rcd 9184.

[65] 12 FCC Rcd 8801-02, ¶48 (footnote reference added).

[66] *See, e.g.*, 12 FCC Rcd 8868, ¶ 168 (declaring resellers of unbundled network elements to be eligible for Lifeline support since otherwise service through unbundled network elements would be the only class of entrants not eligible for Lifeline support).